respect of both contracts wherein the following sums were retained for "Third Party Liability":

Phase I	—	$12,500.05
Phase IV	—	$12,500.95

On November 20, 1970 the engineers issued maintenance certificates in respect of both contracts in the following terms:

"The period of maintenance having expired on 28th September, 1969 and since all the defects have been remedied satisfactorily, the works are therefore certified as completed and maintained satisfactorily in accordance with the terms and conditions of the contract."

Finally on April 13, 1971 the engineers issued a final interim certificate in respect of each contract whereby the retention money for third party liability was released.

The plaintiffs rely on clause 60 of the contract that payment must be made by the defendants within 14 days after the issue of each certificate by the engineers and that they are entitled to receive the $860,165.17 forthwith.

The defendants contend that they are entitled to withhold payment and rely on clause 22 which provides for indemnity by the contractors (the plaintiffs) against third party claims. In support of this contention they point to their liability to pay $410,000 to the Commissioner of the Federal Capital and to remedial expenditures incurred consequent to judgment being entered against them by Realty Development Corporation of Malaysia Bhd.

The question is whether there is a triable issue to prevent leave being granted to sign final judgment: see *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad.*[1] The issue depends on the true construction of the two contracts, the material provisions of which are identical for the purposes of this case. Looking at the contract as a whole, it is clear that it was the intention of the parties that the contractors were to carry out civil engineering works to the satisfaction of the engineer appointed by the employers. Before the end of each month the contractors were to submit to the engineer a statement of the estimated contract value up to date. The engineer was to issue a certificate of permanent work done as he considers reasonable subject to a retention as stated in the conditions of the contract. The employers were to pay the contractors the sum certified within 14 days of the issue of such certificate. This is the normal arrangement for such contracts. Contractors rely on these progress payments to get on with their work. Without these financial arrangements, contractors will be put out of business. Then there are provisions protecting each other's interests, indemnity clauses, insurance clauses and the arbitration clause in the event of dispute. The contract can therefore, be divided into two main parts *viz:* (a) prompt progress payment for work done and (b) the obligations of the parties under the other provisions of the contract. Payments under the first part are therefore independent of claims arising out of the second part. The claim here is in respect of progress payments and the defendants have no right to withhold payment because of claims arising under the second part.

A similar problem arose in the recent English Court of Appeal case of *Dawnays Ltd.* v. *F. G. Minter & Trollope & Colls Ltd.*,[2] where Lord Denning M.R. said:

"An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims whether good or bad except so far as the contract specifically provides".

There are specific provisions in this contract where the defendants are entitled to withhold payment but a claim under clause 22 is not one of them. The only grounds on which the defendants oppose this application arise under clause 22, and I therefore hold that there is no triable issue to refuse leave to sign final judgment in respect of the claim for $860,165.17. The defendants should seek their remedy under clause 22 in separate proceedings.

The claim for interest, however, is another matter. The plaintiffs had written a letter claiming interest at a certain rate for overdue payments. The defendants in their reply appear to have agreed to pay interest but did not specify the rate. The monthly statement of accounts stated a different rate of interest. There is no provision in the contract for the payment of interest in the event of delayed payments. The defendants now deny that there was any promise or agreement to pay any interest whatsoever. In the circumstances I hold that there is a triable issue with regard to the claim for interest.

The plaintiffs are given leave to sign final judgment in the sum of $860,165.17. The defendants are given unconditional leave to defend the claim in respect of interest. The defendants are to pay the plaintiffs the costs of this application.

Order accordingly.

Solicitors: *Joseph & Son; Ng Ek Teong & Partners.*

OTHMAN & ANOR. v. MEK

[O.C.J. (Wan Suleiman J.) July 5, 1971]

[Alor Star — Civil Suit No. 68 of 1968]

Practice and Procedure — Pleadings — Whether frivolous or vexatious — Striking out — Point of law — R.S.C. 1957, O. 25, rr. 2 and 4.

Evidence — Plea of res judicata — When applicable.

In 1958 one Haji Ahmad bin Haji Yusof sued the defendant herein as administratrix of the estate of one Man bin Haji Sa'ad, deceased, claiming specific performance of an agreement to transfer back ½ share of certain lands comprised in two Surat Putus. Judgment was at first given in his favour but on appeal (*Mek* v. *Haji Ahmad* [1960] M.L.J. 133) the Court of Appeal held that his claim was statute barred. Haji Ahmad died in 1963 and letters of administration were taken out by the present plaintiffs. They sought a declaration that half of the undivided shares in the two pieces of land concerned in the 1958 suit was held by the defendant as constructive trustee for the estate of Haji Ahmad and secondly for an order for transfer of the two half undivided shares to

Haji Ahmad's estate. The defence alleged that the action was frivolous or vexatious and ought to be struck out or dismissed. The defence of *res judicata* was also raised.

Held: (1) in all the circumstances of the case, the points of law raised were to be heard and disposed of under Order 25, rule 2;

(2) the plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time. Thus, in the instant case, the plaintiffs were trying to reopen the same subject of litigation in respect of matters which could have been brought forward in the 1958 suit. Therefore the plea of *res judicata* applied.

Cases referred to:-

(1) *Cross* v. *Earl Howe* 62 L.J. Ch. 342.

(2) *Kemsley* v. *Foot & Ors.* [1951] 1 All E.R. 331.

(3) *Mek* v. *Haji Ahmad* [1960] M.L.J. 133, C.A.

(4) *Henderson* v. *Henderson* [1843-1860] All E.R. Rep. 378.

CIVIL SUIT.

Lim Kean Chye (*A. Jayadeva* with him) for the plaintiffs.

Eugene Khoo for the defendant.

Cur. Adv. Vult.

Wan Suleiman J.: Plaintiffs sued as administrator and administratrix respectively of the estate of Lebai Ahmad alias Haji Ahmad bin Yusof, and the defendant was sued as the administratrix of the estate of Man alias Mohamed Saman bin Haji Sa'ad.

An agreed statement of facts put in by the parties, (it being agreed to proceed entirely on the agreed facts), reads as follows: —

"1. Haji Ahmad bin Haji Yusof was the registered proprietor of 4 pieces of land held under Surat Putus Kechik No. 669 and No. 671 and Surat Putus No. 30415 and No. 30416 all situate in the District of Yen, Kedah.

2. Some time in 1926, the said Haji Ahmad charged the said 4 pieces of land to one Karuppan Chettiar and to one Odyappa Chettiar.

3. On various dates in 1935 the charges on the 4 pieces of land were discharged and all 4 pieces of land were transferred to Odyappa Chettiar.

4. On 19th May, 1936 all 4 pieces of land were transferred by Odyappa Chettiar to Man bin Haji Sa'ad and Siah binti Hassan.

5. On 14th day of July, 1936, an agreement in Jawi was made between Haji Ahmad of the one part and Man and Siah of the other part which recited that the 4 pieces of land had been sold to Man and Siah for $1,300 and by which Man and Siah agreed to transfer the 4 pieces of land to Haji Ahmad if the sum of $1,300 was paid to them within 5 years of the date of the agreement.

6. About 2 years after the 14th July, 1936 Haji Ahmad paid the sum of $1,300 to Man and Siah, who transferred the lands held under Surat Putus Kechik No. 669 to Haji Ahmad and Surat Putus Kechik No. 671 to Siah's daughter Mek Ah. At the same time Haji Ahmad obtained the 4 grants of title to the said lands from Man and Siah and also took possession of the said lands which he cultivated until his death on the 18th August, 1966.

7. The 2 pieces of land held in Surat Putus No. 30415 and Surat Putus No. 30416 were not transferred to Haji Ahmad as part of the land held under Surat Putus No. 30416 had been acquired by the Government for a Malay School and the parties were waiting for new grant title to be issued in respect of the remaining portion of the land.

8. Sometime on 23rd Zulhijjah, 1359 (*i.e.* 22nd January, 1941) the land officer Yen registered a Caveat Perunjok No. 1022/59 which against Surat Putus No. 30416 and 2 other pieces of land in Surat Putus Nos. 30418 and 30419 on the ground that the Government intended to purchase the said lands for a Malay School and prohibited the sale, transfer or charge of the said lands.

9. Siah binti Hassan died on or about the 5th day of September, 1940 and letters of administration to her estate were taken out by Haji Ahmad bin Haji Yusof as creditor of the deceased in the magistrate's court at Yen on the 5th February, 1941.

10. Man bin Haji Sa'ad died on or about the 10th day of November, 1944 and letters of administration to his estate were taken out by Mek binti Awang as his lawful widow on the 13th April, 1958.

11. The caveat on the land Surat Putus No. 30416 was removed by the land officer on the 24th July, 1958.

12. On or about the 27th day of August, 1958 Haji Ahmad bin Haji Yusof filed Civil Suit No. 120 of 1958 in the High Court at Alor Star against Mek binti Awang as the administratrix of the estate of Man deceased claiming for specific performance of the agreement to transfer back the lands comprised in Surat Putus Nos. 30415 and 30416 Mukim Sala Besar, District of Yen to the extent of ½ share.

13. The suit was heard before Mr. Justice Hill who by a judgment dated the 19th May, 1959 found that the whole of the sum of $1,300 had been paid and that the claim was not barred by limitation. The judge accordingly gave judgment in favour of Haji Ahmad.

14. Mek binti Awang then appealed to the Court of Appeal against the said judgment and the Court of Appeal allowed the appeal on the 4th December, 1959 holding that Haji Ahmad's claim was barred by limitation.

15. Haji Ahmad subsequently appealed to the Privy Council against the decision of the Court of Appeal. This appeal was withdrawn on the 18th day of September, 1965.

16. Haji Ahmad died on or about the 26th day of June, 1963 and letters of administration to his estate were taken out by the plaintiffs as the lawful son and daughter of the said deceased on the 4th day of October, 1967.

17. On the 8th day of December, 1965 Mek binti Awang as the administratrix of the estate of Man bin Haji Sa'ad (deceased) filed Civil Suit No. 216 of 1965 in the High Court at Alor Star against Mek Ah binti Haji Sa'ad claiming possession of the 2 pieces of land Surat Putus No. 30415 and No. 30416 (now Surat Putus Kechik No. 6763) to the extent of ½ share and for an account of the profits from the said lands.

18. Othman bin Haji Ahmad intervened in the suit as the person in possession of the said land and was made the second defendant in the suit. The suit came on for trial in the High Court at Alor Star before Mr. Justice Gill and an order for possession and accounts was made against Othman bin Haji Ahmad on the 24th September, 1967 and the claim against Mek Ah binti Awang was dismissed.

19. Against this judgment Othman bin Haji Ahmad appealed to the Court of Appeal. The appeal has been stayed pending the trial of this Suit No. 68 of 1968 in connection with the same matter."

The plaintiffs seek to obtain in the first place a declaration that the half undivided shares in the two pieces of land concerned is held by defendant as constructive trustee for the estate of Lebai Ahmad alias Haji Ahmad bin Haji Yusof, and secondly an order transferring the two half undivided shares to the said estate.

I shall first consider whether this action is on the pleadings frivolous or vexatious and ought to be struck out or dismissed, as the defendant seems to suggest, in paragraph 2 of the statement of defence.

In *Cross* v. *Earl Howe*[1] it was held that an application to strike out a statement of claim as being frivolous and vexatious is too late when the pleadings are closed and the action has been set down for trial.

In *Kemsley* v. *Foot and Others*[2] it was held that Order 25 rule 4 was inappropriate where there was a point of law requiring serious discussion and that Order 25 rule 2 should have been used.

I hold in all the circumstances that the points of law raised should be heard and disposed of under the latter rule.

Mr. Eugene Khoo for the defendant contends that there is substantial similarity between the prayers sought by the plaintiff in Civil Suit No. 120 of 1958 and those in the present action. In the former action the plaintiff sought *inter alia*—

(a) for an order that the defendant do transfer the said lands comprised in S.P. 30415 and S.P. 30416 situate in the Mukim of Sala Besar, District of Yen, to the extent of the share registered in the name of Man bin Haji Sa'ad;

(b) alternatively, failing her compliance, for an order that the assistant registrar of the High Court at Alor Star be empowered to sign the transfers for and on behalf of the defendant.

There was also, he said, no real change in the parties in these two actions, since the plaintiffs are suing as administrator and administratrix respectively of the estate of the deceased Haji Ahmad bin Haji Yusof, the same defendant on the same cause of action, so that the claim is *res judicata*.

It cannot be disputed that the plaintiffs are indeed claiming under a party to the first action, the deceased Haji Ahmad bin Haji Yusof. If it is then shown that the cause of action in both are the same *i.e.* the same point or points have been decided against the parties or their privies, then the defence of *res judicata* must succeed.

In *Halsbury's* Laws of England, Third Edition. Volume 15 at Page 185 appears the following passage: -

"In order that a defence of *res judicata* may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering (*i.e.* it being open to him on the pleadings), and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties."

And at page 184 of the same volume, it is stated that:

"To decide what questions of law and fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and is not restricted to the record...."

The judgment of the Court of Appeal in F.M. Civil Appeal No. 16 of 1959 (*Mek* v. *Haji Ahmad*[3]) delivered by Thomson C.J. (as he then was) in allowing the appeal by the defendant, who is also the defendant in the present action may be briefly summed up as follows:

The trial judge found as a fact that the whole of the $1,300 had been paid by the plaintiff and accordingly gave judgment in his favour. Since this finding has not been attacked before the Court of Appeal, it must be accepted. However, the appeal was allowed because the proceedings (Alor Star High Court Civil Action No. 120 of 1958) had been commenced more than eight years out of time and was therefore barred by limitation. Time had begun to run from the date on which the plaintiff had paid the money to Man bin Haji Sa'ad and Siah binti Hassan, which was not later than 14th June, 1939, and on the basis that the obligation to transfer arose *ex contractu*, the period of limitation would be three years reckoned according to the Muslim calendar.

The declaration which the plaintiffs seek in prayer (a) of their statement of claim appears to me to have been raised in substance in the course of the appeal and therefore constitutes one of the points adjudicated upon therein. I quote from the judgment of Thomson C.J. in *Mek* v. *Haji Ahmad*[3] at p. 135:

"Alternatively he argued that whether or not the obligation arose *ex contractu* there was also an equitable obligation to transfer the land and here again, but in this case by reason of section 26 of the Kedah Enactment, the period of limitation was six years. Frankly I think there is very little substance in either argument. I do not, however, propose to discuss the points at length for by reason of section 33 of the Kedah Enactment, which has already been mentioned, calculations for the purposes of it are to be made according to the Mohammedan calendar. Calculating according to that calendar and making allowance for the suspension of limitation during the war a period of six years from 14th June, 1939, expired on 8th January, 1953, that is before the repeal of the Kedah Enactment and some years before the commencement of the present proceedings."

The equitable obligation to transfer, if any, was therefore also time barred, and the question of a constructive trusteeship cannot arise.

The plaintiffs can indeed be said to be trying to reopen the same subject of litigation in respect of matter which could have been brought forward in Civil Action No. 120 of 1958. As was held in *Henderson* v. *Henderson*,[4] where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except in special circumstances, permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

The action is dismissed with costs.

Action dismissed.

Solicitors: *Lim Cheng Ean & Co.; Jayadeva & Zahir; Eugene Khoo & Co.*